

10 FRISKIT, INC.,

No. C 03-5085 WWS (MEJ)

11 Plaintiff,

12 vs.

13 REALNETWORKS, INC., and LISTEN.COM.,

14 Defendants.

15 ORDER DENYING DEFENDANTS'
16 MOTION FOR PROTECTIVE ORDER
17 PREVENTING CAMERON PRICE AND
18 MICHAEL LARSON FROM ACCESSING
19 CONFIDENTIAL MATERIALS

I. INTRODUCTION

20 Before the Court is a letter dated July 22, 2005 from defendants RealNetworks, Inc. and
21 Listen.com (collectively "Defendants"), and a response letter dated July 27, 2005 from plaintiff Friskit, Inc.
22 ("Plaintiff"). Defendants move this Court for a protective order preventing Cameron Price and Michael
23 Larson from accessing confidential materials.

II. BACKGROUND

24 As an initial matter, the Court notes that the parties have failed to submit a joint discovery dispute
25 letter regarding the issue at hand. Rather, contrary to this Court's standing order regarding discovery
disputes, the parties submitted individual letters. In the future, if parties fail to abide by this Court's standing
order, and continue to fail to submit joint discovery letters, the Court shall not hear the matter.

26 The current dispute before this Court ensued when Plaintiff identified two individuals, Michael
27 Larson ("Larson") and Cameron Price ("Price"), as its independent experts. Larson is a former employee
28

1 of Plaintiff, while Price is a former employee of Defendants. The Court will address Defendants' narrowly
2 tailored request for a protective order preventing Larson and Price from accessing confidential materials.

3 **A. Defendants' Arguments**

4 The Protective Order specifically contemplates that a non-party individual who is to review
5 confidential information be "independent." Defs.' Letter at 2. Defendants advocate for a broad
6 construction of the term "independent." Defendants contend that Price is not independent because he is a
7 former employee of Defendants. Defendants further argue that Price is subject to an "Employee
8 Development and Confidentiality Agreement" that prevents him from conveying "to any third party
9 information describing any Confidential Information or Trade Secret without Defendants' prior written
10 authorization, even after termination of his employment. Defs.' Letter at 2. For these reasons, Defendants
11 argue that Price should be precluded from accessing Defendants' confidential information.

12 Defendants also argue that Larson should be precluded as well. In support of their argument, they
13 state, "as a former Friskit [Plaintiff] employee, Mr. Larson *may* own stock in the company and/or retain
14 working relations with individuals such as...Friskit's former CEO." Defs.' Letter at 3 (emphasis added).
15 Defendants further state, "Mr. Larson *may* wield some influence over company direction." Defs.' Letter at
16 3 (emphasis added).

17 **B. Plaintiff's Arguments**

18 On the other hand, Plaintiff argues that Defendants do not offer any evidence for their assertion that
19 Larson has any ties with Plaintiff. Rather, Plaintiff argues that Defendants simply speculate as to Larson's
20 ties with Plaintiff by stating that Larson "may own stock" or "might" have some kind of a working
21 relationship with Plaintiff. Pl.'s Letter at 2. Without more, Plaintiff states that Defendants have failed to
22 meet their burden of proof for the motion.

23 Plaintiff also states that Defendants' arguments with respect to Price is illogical. First, Plaintiff
24 argues that while Price was previously exposed to the confidential information during his employment with
25 Defendants, he is now denied the same information. Pl.'s Letter at 2. In addition, Plaintiff states that while
26 Price was trustworthy to receive this information working for Defendants, he is less trustworthy to receive it
27 now. Pl.'s Letter at 2. There is no evidence to support a contention that Price is now untrustworthy.

III. DISCUSSION**A. Standard of Review**

Access to confidential information turns on the individual's "actual" activity and relationship with the party. Carpenter Technology Corporation v. Armco, Inc., 132 F.R.D. 24, 27 (E.D. Pa. 1990). In determining whether to qualify an expert as "independent" under the terms of a protective order, the court should consider and weigh the following factors: (1) the experts's position within the receiving party's business as an officer, director, shareholder or employee; (2) the extent of regular employment, consultation or association with the receiving party; (3) the expert's present involvement in the receiving party's competitive decisions including participation in or advise related to research; (4) the potential for future involvement of the expert in the receiving party's competitive decisions; (5) if the expert is deemed disqualified as "independent," the individual's willingness to curtail or forego future involvement with the receiving party. Digital Equipment Corp. v. Micro Technologies, Inc., 142 F.R.D. 488, 491 (D. Colo. 1992).

In other words, the ultimate focus of the "court's decision should rest upon considerations of the individual's relationship to or status within the receiving party's business, the likelihood of that relationship continuing, and the feasibility of separating either the knowledge gained or the individual from future competitive endeavors." Id. at 491.

B. Whether Larson Qualifies as an Independent Expert

Here, there is no evidence that Larson meets any of the five factors outlined in Digital Equipment Corp. Id. Moreover, Larson has not occupied a position with Plaintiff for over four years. In addition, Defendants have not submitted any evidence that Larson is involved with Plaintiff's competitive decision making. Without more, the Court declines to grant Defendants' motion for protective order preventing Larson from accessing confidential materials.

C. Whether Price Qualifies as an Independent Expert

In the same way, Defendants do not support their contention regarding Price. Defendants argue that Price is not an "independent" expert, as required by the protective order, because he was previously in Defendants' employ. The mere fact that Price was Defendants former employee does not automatically bar

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1 Price from being an "independent" expert. Carpenter Technology, 132 F.R.D. at 27. Here, again,
2 Defendants do not support their contention with specific facts. Rather, Defendants rely on the existence of
3 an employee confidentiality agreement for precluding Price access to Defendants' confidential information.
4 However, the terms of the employee agreement provides against any *unauthorized disclosure by Price* of
5 Defendants' confidential information, not authorized *access to Price* the same information. As the motion
6 before the Court relates to the latter, the Court will not address the issue of the employee confidentiality
7 agreement which may prevent Price from disclosing confidential information to third parties.¹

8 Much of the confidential information at issue is the same information that Price has already had
9 access to while working for Defendants. Price's work during his employment with Defendants exposed him
10 to a large amount of trade secret information, more specifically, to the source code, which is the apparent
11 basis for Price's expertise. The motion at hand requests an order preventing Price from seeing the same
12 information he already has seen. The evidence does not support the contention that Price is not
13 independent, i.e., involved in Plaintiff's competitive-decision making. In addition, Price does not meet the
14 five factors outlined in Digital Equipment. 142 F.R.D. at 491. Price's only connection to Defendants is the
15 mere fact of being a former employee. Therefore, without more evidence to support Defendants contention
16 regarding Price, the Court is unwilling to grant Defendants motions.

17 **IV. CONCLUSION**

18 The Court hereby DENIES Defendants motion for protective order preventing Larson and Price
19 from accessing confidential information.

20 IT IS SO ORDERED.

21 Dated: September 12, 2005



MARIA-ELENA JAMES
United States Magistrate Judge

25 ¹ Defendants request a protective order preventing Price and Larson from *accessing* confidential
26 information. Assuming deadlines have not yet passed, Defendants are free to file other motions to prevent Price
27 from disclosing confidential information or to bar Price as an expert witness altogether, pursuant to the employee
confidentiality agreement.